

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 423 OF 1991

1. DAVID MUKASA SENDAULA }
2. JOYCE WANYANA } PLAINTIFFS

VERSUS

1. CHRISTINE NAKALANZI }
2. EDITH NANTUMBME } DEFENDANTS

BEFORE: THE HONOURABLE JUSTICE I. MUKANZA

RULING

When this case was called for hearing the learned counsel appearing for the defendant raised a preliminary objection on point of law. He submitted that the suit is time barred by the limitation Act and that the suit should be rejected in accordance with order 7 rule 11 of the civil procedure rules which provides that the plaint shall be rejected in the following ways.

a.....

b.....

C.....

d. where the suit appears from the statement in the plaint to be barred by any law.

e.....

Mr. Ayigihugu submitted that the law applicable is the law of limitation CAP 70 laws of Uganda Section 6 which states:-

“No action shall be brought by any person to recover land after the expiry of 12 years from the date on which the right of action accrued to him or if first accrued to some person through whom he claims to that person”

He continued that the plaintiffs were suing in the representative capacity of the estate of one Musa Kalenzi Mugenzi their claim was not limited from the date from the time they became administrators of the estate which according to Annexure A the deceased died in 1984 but they obtained letters of Administration in October 1986.

So the period of limitation began to run the life time of Musa Kalenzi Mugenzi as stated under Order 7 of the CPR. According to the plaint Annexure B that is the certificate of title the second defendant became the registered owner of the suit property on 22nd November 1983. The second defendant took possession of the property immediately thereafter and built housed there on and planted Banana plantations. And further look at Annexure B Mukasa Kalenzi Mugenzi became the proprietor registered of the suit land on the 15th January 1969 but on 20th January 1969 the first defendant became the registered owner of the suit land Kalenzi was the registered owner of the suit land for only 5 days then on the 22nd November 1983 the 2nd defendant became the registered owner of the suit land, since then the 2nd defendant has been in occupation of the suit land undisturbed. It should be noted that the plaintiffs obtained letters of Administration on 30th October 1986 and did nothing until June 1991 when they filed the instant suit.

In paragraph 8 of the plaint Kalenzi died in August 1984 therefore during his life time the 2nd defendant was in occupation of the suit land as registered owner undisturbed by the deceased except some time when the deceased lodged a caveat against the land through his counsel the late Ssesanga that the plaintiff tried to go around this limitation in para 7 by stating that it was in September 1983 when the deceased discovered that title to his land was missing and that on investigation discovered that the first defendant had registered the land and transferred it in November 1983. The deceased Kalenzi is dead. He could not be here to give evidence but knew that the first defendant was the registered owner of the land.

In the circumstances it is clear from the plaint particularly annexure A and B that the deceased Mukasa Kalenzi Mugenzi knew that he had lost ownership of the land in 1969, He took no step

to recover it during his life time and the plaintiffs who were his near personal representative could not recover this land and prayed that the plaint be struck out because it was bad in law frivolous vexatious and fraudulent to recover this land which was fully developed which development took place during the life time of Kalenzi

On the other hand Mr. Lutakome the learned counsel who appeared for the plaintiffs submitted that he was fully conversant with the law cited by his leaned friend but his colleague has wrongly applied the law. In paragraph 10 the suit is based on fraud and the various allegation (of fraud are narrated there in and in various paragraphs. Under S. 26 of the limitation Act the period of limitation cannot start to be computed until fraud is discovered so in case of recovery of land where the suit must be filed within 12 years when the plaintiff complains of fraud one starts compiling the date when the defendants discovered fraud.

In paragraph 7 of the plaint it is stated that the late Musa Kalenzi discovered that the certificate of title was missing and that is when he stated to know that there was a foul play and that is when he instructed his lawyer in 1984 and there a caveat was lodged. On the question of encumbrances Mr. Lutakome submitted that his learned brother was telling lies that the fraud was discovered in 1969. It is premature to come out with such a statement such statement could not be entertained at that stage. Look at the period from 1983 as the starting period to calculate the period. This suit was filed in 1991. That meant the Twelve years have not expired in the light of S. 26 of the limitation Act, The learned counsel also referred me to page 2 Part III of the land Register titled Encumbrances Annexure B which were referred to by his learned friend and submitted that that shows that the land had been a subject of various disputes. As one goes to the bottom of page 2 of encumbrances one discovers that the late Musa Kalenzi lodged a caveat then and the same was pleaded in paragraph 10(b) of the plaint but the second defendant fraudulently caused the removal of the caveat on 9th May 1990. That was done when the late Musa Kalenzi had died. The present plaintiff have no knowledge how the caveat was removed. The last endorsement on para 2 of encumbrances reflects that the second defendant had lodged a caveat on the suit property on her own land. At this stage they do not know why the second defendant who claims that was the owner of the land lodged a caveat. Those are matters which the court must address itself properly when evidence has been led. His learned friend had submitted that there were some tenants and developments on the land and that the 2nd defendant was in possession. He contended that it was

not easy to say whether there were such development unless some evidence was led. He prayed that the preliminary objection be overruled because the suit was filed in time.

Mr. Ayigihugu in reply submitted that it would be a waste of time to hear this case because according to the rules he quoted. That the pleadings show that the suit is time barred. Paragraph 8 on which his learned friend relied n could not be in the knowledge of the plaintiff which they could prove of their own knowledge. Neither of the plaintiffs stated that they discovered it but it was the deceased who discovered the fraud. That was the time they stated computing the time, Paragraphs 8 is contracted by the entry on Annexure B of 5/3/69. His client was accused of lodging a caveat but he had a certificate of title. The legal conclusion was that when the entry was made Kalenzi who is now dead had a certificate of title and must have known the proprietor of the land was the first defendant. He contended that it was the truth that section 26 of the limitation Act proposes the period of limitation where fraud is pleaded with reasonable diligence. He referred me to page two of the certificate “encumbrance” He submitted that the land was full of disputes. The deceased could not have failed to discover any thing on the land. He was registered for only 5 days.

He concluded since 1986 when the plaintiffs got letters of Administration were they not a ware of the fraud? He prayed that the plaint be rejected.

I now proceed to consider the objection the plaint shows that the, plaintiffs brought this action against the defendants in their representative capacity as the Administrators and trustees of the Estate of the late Musa Kalenzi Muganzi comprised in Mailo register, Kibuga Block 28 plot 540 situated at Makerere. Paragraph 6 of the plaint alleges that at all material time to this suit the late Muss Kalenzi was the lawful proprietor of the land discussed above.

Where as paragraph 7 avers that sometime in September 1983 the deceased discovered that the certificate of title to his said land was missing and on investigation it was discovered in September 1983 that the first defendant had registered herself as owner of the said land and subsequently transferred it to the second defendant in November 1983 and the latter was still the registered proprietor f the same to the present day.

However in paragraph 8 it was alleged that the deceased suspicious of foul play to his land was first aroused in September 1983 when the second defendant directed tenants on the said land to vacate it.

The deceased lodged a caveat on the said land in the land office at Kampala on 11th October 1983 through his lawyer Mr. Sessanga (deceased). The late Musa Kalenzi died in August 1984, His lawyer died two years later.

The crucial issue upon which a decision is sought is to find out whether the action was brought after more than twelve years in contravention of section 6 of the limitation Act. There is provision of the same Act which provides that the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake as the case may be, or could with reasonable diligence have discovered it.

In the instant case it was the deceased the said Kalenzi Mugenzi who first discovered in 1983 that the first defendant had the suit property registered in his own names and later had the land title transferred to the second defendant who is the current registered owner of the disputed land. The deceased then instructed his lawyer Mr. Sessanga in 1983 who lodged a caveat, Kalenzi Mugenzi is alleged to have passed away in August 1984 and his lawyer died two years afterwards, whereas the plaintiffs got letters of administration to the estate of the late Mugenzi Kalenzi in 1986. The plaintiff further alleged that the plaintiff on their own discovered that there was foul play when they learnt that the defendants were evicting tenants from the suit property. I am of the view that the cause of action arose in 1983 when the plaintiffs discovered the alleged fraud and or at the said date when the late Sessanga lodged a caveat to the disputed land which was also in the same year 1983. I do not therefore subscribe to the submission of the learned counsel appearing for the defendants that the computation of time began to run from the life time of the deceased from 15/1/1969 when the said Kalenzi was then registered as the first owner of the suit property as per the encumbrances on part III of the certificate of title. It was contended by Mr. Ayigihugu that the deceased knew that the first defendant was the owner of the land when the latter had the land registered in his own names. I am of the firm view that it is premature to ascertain at this stage whether the deceased had such knowledge. Such matter has to be proved when evidence is led at the trial of the substantive suit.

In addition according to section 26 of the limitation Act the period began to run after the discovery of the fraud in 1983 as I had earlier found and the action was filed in 1991. The action was therefore brought within the prescribed period of 12 years. It was instituted within 9 years and as such it was not time barred See George William Joga V Ashy Musoke Bagirawalo court of appeal for East Africa. Reported 1977 HCB A 68. In addition since the defendants were claiming that the instant case was filed after the expiration of twelve years, The issue of limitation was triable which could only be determined after hearing the evidence on the matter See Murome vs Kiko and Another 1985 HCB P 68.

Mr. Ayigihugu had also contended that the suit was frivolous, vexatious and fraudulent and that the same should be dismissed as having failed to disclose a cause action, The learned, counsel was referring to order 7 rules 11(e) of the CPR. Unfortunately he never laid ground for this objection and it appears he was introducing some thing new in his argument because his preliminary objection to the plaint was based on the fact that it was time barred see order 7 rule (d) of the CPR.

With that explanation above it is the firm view of this court that the preliminary objective must fail. The same is over ruled with costs to the plaintiffs.

I. Mukanza

JUDGE

18/8/93